



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Atmospheric Research Systems, Inc.

File: B-242914; B-242914.2

Date: June 12, 1991

Jacob B. Pompan, Esq., Pompan, Ruffner & Bass, for the protester.

James K. White, Esq., Department of Commerce, and Stuart Young, Esq., General Services Administration, for the agencies.

Stephen Gary, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency properly obtained waiver from mandatory use of protester's Federal Supply Schedule (FSS) contract with the General Services Administration (GSA); since contracting agency and GSA reasonably determined that substantial portion of agency's needs for acquisition and processing of lightning data cannot be met from protester's FSS contract, procurement on basis of full and open competition was proper.

DECISION

Atmospheric Research Systems, Inc. (ARSI) protests the issuance of request for proposals (RFP) No. 52-DDNW-1-00012 by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce. The RFP provides for the acquisition and processing of lightning data on the basis of full and open competition. According to ARSI, the same equipment and services are available under the firm's Federal Supply Schedule (FSS) contract with the General Services Administration (GSA); since NOAA is a mandatory user of the FSS contract, ARSI argues, NOAA is required to utilize the FSS contract rather than conduct the procurement competitively.

We deny the protest.

BACKGROUND

NOAA announced its intention to issue a competitive solicitation for the requirement in the Commerce Business Daily (CBD) in October 1990. The announcement stated that the prospective

contractor would be required to provide data to be used by NOAA's National Weather Service (NWS) and by other federal agencies, such as the Federal Aviation Administration (FAA) and Bureau of Land Management; it indicated that the contractor would be required to furnish the data to specified government sites for display and processing, supply the hardware and software needed to receive and display the data and transfer it to government systems, and maintain or permit the government to maintain an archive of the lightning data.

Subsequently, ARSI advised NOAA of its belief that the equipment and capabilities available under ARSI's FSS contract with GSA, No. GS-00F-03679, under which NOAA was a mandatory user, would satisfy the requirements set forth in the CBD. In January 1991, at ARSI's request, representatives of the firm met with NOAA contracting and technical personnel to discuss ARSI's ability to satisfy the government's needs under the terms and conditions of ARSI's FSS contract. Based on those discussions and its own review of the contract, NOAA determined that its needs could not be met from the schedule and requested a GSA waiver from mandatory use of the FSS contract.

NOAA included in its waiver a request for copies of the CBD synopsis and the proposed statement of work (SOW), and explained that NWS required the capability of displaying and processing the data so that lightning activity could be incorporated into its assessments of severe weather, and also required the capability of combining the lightning data with other data to produce summaries, reports, warnings, and graphic depictions of thunderstorm activity. In addition, NOAA stated that other government agencies would be optional users; the FAA, for example, would use the data to provide thunderstorm reports to airports for aviation safety purposes. According to NOAA, while these applications required the distribution of data to various sites around the country where the data could be accessed by multiple users, it had concluded from its discussions with ARSI and its review of the FSS contract that the data available under that contract were for display purposes only; if the government also required processing and distribution of the data to other government sites, the services could not be provided at the prices specified in ARSI's FSS contract.

After reviewing NOAA's waiver request and ARSI's FSS contract, GSA advised NOAA that "the items required by your office are significantly different from items currently in our [FSS] system. Therefore, a waiver is granted for the purchase of these items from a source other than the [FSS]." When NOAA then proceeded to issue a solicitation whose SOW included the requirements described in NOAA's waiver request, ARSI protested first to the agency, and then to our Office.

ARGUMENT

ARSI argues that NOAA's requirements can and therefore must be met through its FSS contract, under which NOAA is a mandatory user. The protester asserts, for example, that the lightning data under the contract are available for processing, distribution, and archiving, and not only for display as GSA and NOAA concluded. ARSI further argues that the FSS contract clearly provides for multiple users of the data, by its inclusion of options for multiple users at discounts from the single-user price. Consequently, according to the protester, its FSS contract provides the detailed pricing structure required to meet all of NOAA's needs and therefore must be used instead of the competitive solicitation.

ANALYSIS

The purpose of the FSS program is to provide government agencies with a "simplified process of acquiring commonly used supplies and services in varying quantities at lower prices while obtaining discounts associated with volume buying." See Federal Acquisition Regulation (FAR) § 38.101; see also FAR § 8.404. Contracts are awarded using competitive procedures, and the schedule contracting office issues published schedules containing the information needed for placing delivery orders with the schedule contractors. Id. Where there is a mandatory FSS in effect, an agency generally is required to meet its requirements from that schedule if its minimum needs will be satisfied by the items listed on the schedule. See Lanier Business Prods.--Oklahoma, B-237150, Jan. 17, 1990, 90-1 CPD ¶ 63. If an agency determines, however, that equipment or services available under the FSS will not meet its needs, it may seek a waiver from mandatory use of the schedule; we will not object to such a waiver request unless it is shown to lack any reasonable basis or to have been made in bad faith. Id.

In this case, there is no allegation or indication of bad faith; based on the record, moreover, we find that a reasonable basis existed for concluding that NOAA's needs could not be met through the use of the mandatory FSS schedule contract.

MULTIPLE USERS

NOAA determined that there is no provision under ARSI's FSS contract for data to be processed and distributed for use by multiple users. NOAA noted that commercial literature incorporated into ARSI's FSS contract states that:

"The fees listed above are for a single data user confined to one display terminal.

Discounts are available for companies requiring multi-user terminals.

The use of data by more than one user may require additional charges. Other restrictions may also apply."

In challenging NOAA's determination, ARSI argues that "the customer has the right under his contract with ARSI to process the data to as many internal users as he chooses at no extra cost." The protester goes on to define an internal user as one "on the same . . . installation or at the same central data transmission point," and states that "the government user does not pay extra for processing and communicating the data to multiple users, provided that the lightning data cannot be manipulated in real time at any of the multiple sites other than the originator." In this regard, the protester cites an agreement it claims is executed by all of its FSS government data stream customers, which provides that the client may use the data "solely for its own internal use, [including] the right to display or communicate the data or information or graphics based on the data as more specifically described on the data stream fee schedule." According to ARSI, this agreement means that the customer can receive, process, and retransmit the processed data to as many users as necessary, "at no extra cost as long as the users are organizationally a part of that customer so that it can be considered . . . 'internal use,'" and this would encompass the uses under the RFP in issue. ARSI questions NOAA's conclusion that the schedule contract only provides for single-user pricing, pointing out that the contract also states that "discounts are available for companies requiring multi-user terminals." According to the protester, the actual amount of these multi-user discounts can be calculated by reference to other contract provisions stating that the government is entitled to the best discount offered to ARSI's commercial customers; thus, according to the protester, multi-user pricing is in fact available under the FSS contract.

We find ARSI's position unpersuasive. As we read the contract itself, which governs the obligation of the parties, it narrowly defines the "user" to be permitted access to the lightning data for the listed fees, providing, specifically "for a single data user confined to one display terminal." This provision is inconsistent with ARSI's interpretation (developed, apparently, solely for purposes of supporting its protest) that the agency may process the data to as many internal users on the same installation as it chooses at no additional cost. Furthermore, even if ARSI were correct that the listed contract prices cover the use of multiple data

terminals at one installation, they clearly do not cover the capability needed by NOAA of distributing the data to multiple users--including other federal agencies--at various sites. Nor does it appear that ARSI's FSS contract already provides for multi-user pricing. On the contrary, it only indicates that "use of data by more than one user may require additional charges. Other restrictions may also apply." In other words, the contract neither establishes a definite multi-user charge nor definite contractual terms governing multi-user use.


ARSI's suggestion that discounted prices may be calculated by reference to prices charged the firm's commercial customers is inconsistent with the rationale of the FSS program. Agencies are permitted to order from the schedule by placing orders directly with vendors, without first obtaining competition, because the FSS contracts were awarded pursuant to the FAR, and the schedule prices already have been negotiated by GSA to assure fair and reasonable prices to the government; that is, the specific, listed prices shown on the schedule have already been tested in the marketplace through the competitive FSS solicitation process. See FAR §§ 8.404(a) and 38.102. Although the government may be entitled to reductions in previously negotiated prices, there is no provision for negotiation by the contracting agency of FSS contract prices for additional services not previously priced; rather, the published schedule price lists must be used. See FAR § 38.102. The absence of established negotiated prices is significant because the highest percentage discount that is offered to a firm's commercial customers, when applied to the schedule price charged the government, may still result in a significantly higher price than the government could have negotiated; according to GSA, the government's negotiated schedule prices under the FSS program are quite often lower than the best prices that schedule contractors offer to commercial, nongovernment customers.

We conclude that NOAA reasonably determined that contract coverage for single data users did not cover the requirement for the distribution of data to multiple data users and that specific multi-user prices were not shown on ARSI's FSS contract; multi-user services and corresponding prices were never the subject of negotiation with a "schedules contracting officer," as required by FAR § 38.102. See Rack and Stanley, B-205059, May 25, 1982, 82-1 CPD ¶ 494 (only those items that GSA specifically required to be priced for inclusion on FSS contracts are part of mandatory schedule). ARSI has thus failed to show that NOAA and GSA lacked a reasonable basis for their determination that a waiver was appropriate with respect to this requirement. See Lanier Business Prods.--Oklahoma, B-237150, supra.

PROCESSING OF DATA

ARSI also argues that NOAA incorrectly concluded that processing and archiving of data are not provided for in the FSS contract; according to the protester, they are not described separately in the contract because they are standard features included in the basic data stream service. NOAA reports, however, that at its January meeting with ARSI, representatives of the firm maintained that the FSS contract prices only covered the display, and not the processing and further distribution, of the data. Although ARSI questions the agency's account of the meeting, we again note that the contract specifies that the fees are "for a single data user confined to one display terminal," and that "use of data by more than one user may require additional charges. Other restrictions may also apply." The "other restrictions" that might apply are not specified in the FSS contract and presumably would have to be defined by the contractor or through negotiations. Indeed, ARSI cites no provision of the contract specifically allowing processing and further use of the data. In effect, therefore, ARSI's FSS contract lacks not only specific prices for services other than the display of data for a single user, but also definite technical specifications for those services. See Rack and Stanley, B-205059, supra. Under these circumstances, NOAA and GSA reasonably concluded that the needs of the contracting agency for services other than displaying the lightning data could not be satisfied under ARSI's FSS contract. See Lanier Business Prods.--Oklahoma, B-237150, supra.

The protest is denied.


for James F. Hinchman
General Counsel